



WILLIAMS MULLEN

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February 9, 2011

*BY CERTIFIED MAIL – RETURN RECEIPT REQUESTED*

Eugene A. Conti, Jr., Secretary  
N.C. Department of Transportation  
1501 Mail Service Center  
Raleigh, NC 27699-1501

**Re: Proposed Highway Bypass around the Eastern Portion of Southern Pines, North Carolina**

Dear Secretary Conti:

I write to you as counsel to The Walthour-Moss Foundation (the "Foundation"), owner of 4000 acres of land (the "Property") in the path of a proposed alignment, as set forth on the enclosed map, of a federally-funded highway bypass around the eastern portion of the City of Southern Pines, North Carolina (the "Bypass"). The Property is home to an endangered animal species and is eligible for listing on the National Register of Historic Places (the "Register"). The Property has been dedicated and used for pedestrian and equestrian purposes for more than 50 years and is open to the public. The Property is undeveloped, contains a wide variety of plant and animal species, and its unique and important natural and ecological values have been recognized by the North Carolina Natural Heritage Program by inclusion on the Biennial Protection Plan List of Significant Natural Heritage Areas.

Because construction of the Bypass would fundamentally alter the natural, historic and scenic value of the Property and would result in the taking of the Red Cockaded Woodpeckers present there, the Foundation believes the North Carolina Department of Transportation ("NC DOT") must select an alternate route for the Bypass. The Foundation wishes to make NC DOT aware of these issues early in its planning process for the Bypass, to ensure that there is ample time to select an alternate route and that scarce state resources are not expended on pursuing a route for the Bypass that will ultimately prove untenable.

*A Professional Corporation*

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As you know, Section 4(f) of the federal Transportation Act, 23 U.S.C. § 138, prohibits the use of federal funds for the construction of a highway over sites of historic significances unless:

- (1) [T]here is *no feasible and prudent alternative* to the use of such land, and
- (2) [S]uch program includes *all possible planning to minimize harm* to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

*Id.* (emphasis added). The United States Court of Appeals for the Fourth Circuit explained in *Hickory Neighborhood Defense League v. Skinner* that:

An alternative is feasible unless "as a matter of sound engineering" it should not be built.

893 F.2d 58, 61 (4th Cir. 1990). Regarding the requirement that there be no "prudent" alternative to the use of protected land, the Court stated:

Congress did not intend that costs and community disruptions were to be ignored. However, the [Supreme] Court [has] noted that *protection of section 4(f) land "was to be given paramount importance."* Thus, section 4(f) land could not be used unless "there were truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes." The Court also noted that the Secretary could not approve the use of section 4(f) land unless the alternatives would present unique problems.

*Id.* (emphasis added). Given the availability of other lands for the Bypass that would not affect the Property's historic values, I do not believe that NC DOT will be able to satisfy the heightened standard of Section 4(f).

In addition, the presence of Red Cockaded Woodpeckers at the Property – indeed, throughout the entire area surrounding the Property – will present significant obstacles to using the currently proposed route for the Bypass. Section 7(a)(2) of the Endangered Species Act prohibits the federal government from undertaking or funding any action that would:



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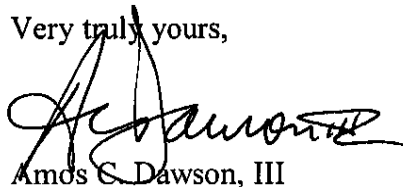
[J]eopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical....

16 U.S.C. § 1536(a)(2). The Bypass would transform the existing, contiguous habitat in this area into several isolated and fragmented habitat areas, facilitate further development and additional habitat destruction, and introduce a significant disruption to the natural environment that could jeopardize the surrounding population of Red Cockaded Woodpeckers, as a whole. The Foundation believes these concerns will likely prevent construction of the Bypass as currently proposed.

Finally, though it is unlikely that NC DOT would be able to avoid the need to prepare an Environmental Impact Statement ("EIS") for the Bypass, selecting an alternate route that avoids the Property and the surrounding area will help to reduce the scope of an EIS. It will also help to avoid triggering the requirements of Section 106 of the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470(f), and the need for, or scope of, consultations with the Fish and Wildlife Service regarding the effect of the Bypass on Red Cockaded Woodpeckers. The Foundation will closely monitor DOT's planning for the Bypass to ensure that all requirements of the National Environmental Policy Act ("NEPA"), the North Carolina Environmental Policy Act ("SEPA"), NHPA, Section 4(f), the Endangered Species Act and all other applicable laws and regulations are strictly complied with.

In light of the increasing budget constraints facing state agencies, the Foundation urges NC DOT to select a more viable route for the Bypass. Please feel free to contact me at (919) 981.4010 if I can provide you with any additional information.

Very truly yours,



Amds C. Dawson, III

Enclosure

cc: Greg Thorpe, PhD,  
NC DOT Project Development and Environmental Analysis  
Frances Bisby, NC DOT Transportation Planning Branch  
Stephen F. Later, Vice Chairman, Walthour-Moss Foundation

# Highway Map



## SOUTHERN MOORE COUNTY Working Map

Plan date: June 1, 2006

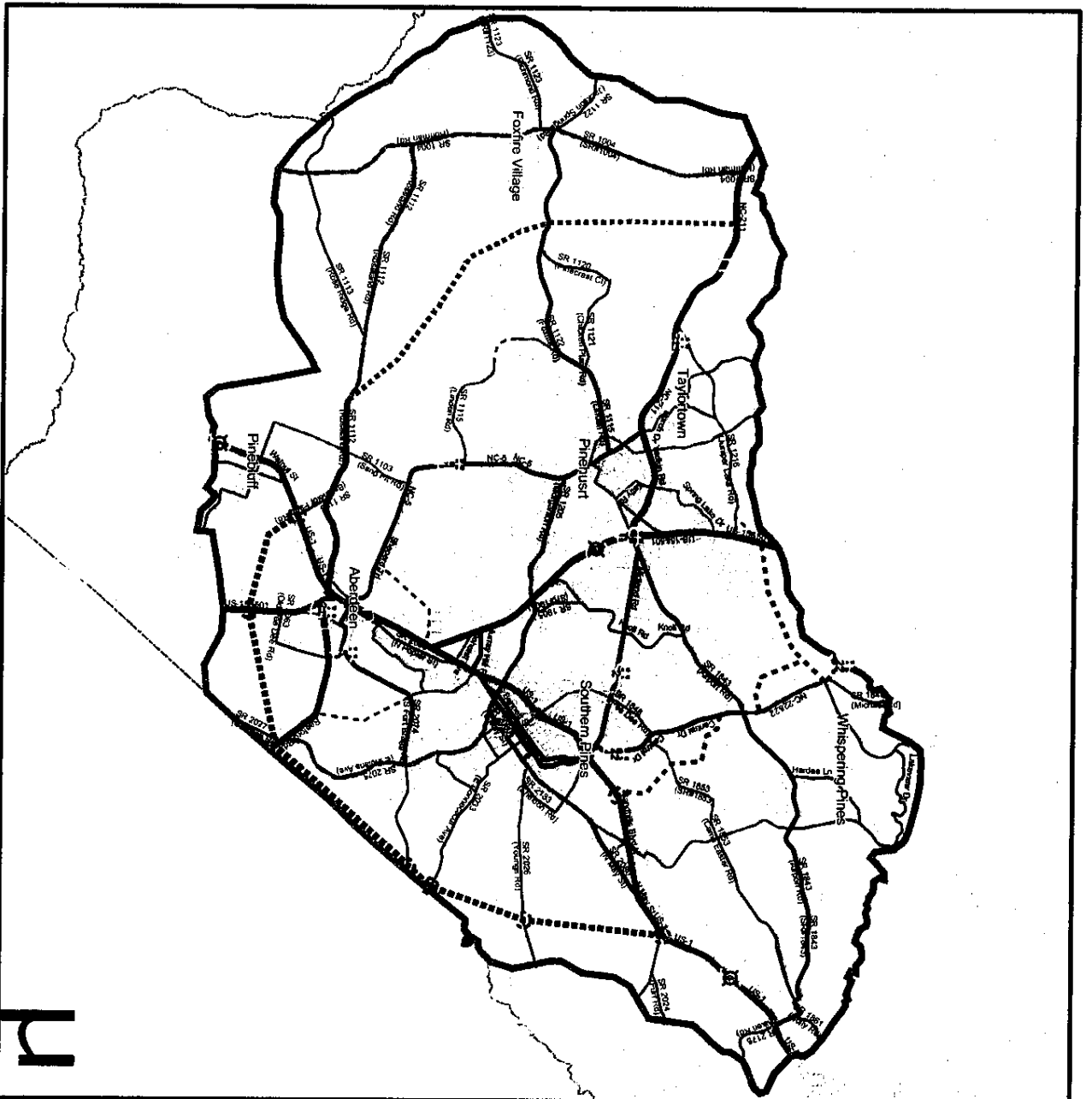
- Freeways**
  - Existing
  - Needs Improvement
  - Recommended
- Expressways**
  - Existing
  - Needs Improvement
  - Recommended
- Boulevards**
  - Existing
  - Needs Improvement
  - Recommended
- Other Major Thoroughfares**
  - Existing
  - Needs Improvement
  - Recommended
- Minor Thoroughfares**
  - Existing
  - Needs Improvement
  - Recommended
- Interchanges**
  - Existing
  - Proposed
- Grade Separation**
  - Existing
  - Proposed

0 0.45 0.9 1.8 2.7 Miles

Sheet 2 of 5

Base map date: June 2005

Refer to CTP document for more details



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